

UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
BEFORE THE HONORABLE STEPHEN L. JOHNSON, JUDGE

In Re:	)	Case No. 12-56050
	)	Chapter 11
AUTO CARE MALL OF FREMONT, INC.,	)	
	)	
Debtor.	)	Thursday, January 3, 2013
	)	San Jose, California

Hearing on:

- a) Motion for relief from stay, by Bank of Marin [45];
- b) Opposition by debtor;
- c) Motion to convert case to Chapter 7, by the Office of the U.S. Trustee [48];
- d) Response by Bank of Marin;
- e) Hearing re approval of the disclosure statement, by debtor [41];
- f) Objection by the U.S. Trustee;
- g) Objection by Bank of America;
- h) Objection by Bank of Marin; and
- i) Status conference [6], continued from December 17, 2012.

Appearances:

For the Debtor:	Patrick Calhoun, Esq.
For Daniel Duke:	Patrick Costello, Esq.
For Bank of Marin:	Neil J. Rubenstein, Esq. Craig Chiang, Esq.
From the Office of the U.S. Trustee:	John S. Wesolowski, Attorney Advisor
For Bank of America:	Regis A. Guerin, Esq. (via telephone)

Digital Court Recorder:	United States Bankruptcy Court Clerk of the Court 280 South First Street, Room 3035 San Jose, California 95113
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1 Thursday, January 3, 2013

3:05 o'clock p.m.

2 P R O C E E D I N G S

3 THE CLERK: Court is now in session.

4 THE COURT: Okay. Good afternoon, everybody.

5 [COUNSEL]: Good afternoon.

6 THE COURT: Happy New Year.

7 THE CLERK: This is the Court's 3:00 p.m. calendar, in  
8 the case of Auto Care Mall of Fremont, Inc. Could we have  
9 appearances, please?

10 MR. CALHOUN: Patrick Calhoun for the debtor.

11 THE COURT: Okay.

12 MR. COSTELLO: Good afternoon, Your Honor. Patrick  
13 Costello for Daniel Duke.

14 MR. RUBENSTEIN: Good afternoon, Your Honor. Neil  
15 Rubenstein and Craig Chiang for Bank of Marin.

16 MR. WESOLOWSKI: And John Wesolowski for the U.S.  
17 Trustee.

18 MR. GUERIN: Good afternoon, Your Honor. Regis Guerin  
19 for secured creditor Bank of America.

20 THE COURT: Okay. Good afternoon to everybody.  
21 Please be seated. Sorry.

22 All right. So this is – this is a motion –  
23 effectively it's a motion for relief for stay that was brought  
24 by Bank of Marin, who has installed a receiver at the property,  
25 who the Court has left in place during the pendency of the

1 bankruptcy case.

2           And because the Court earlier found it's a single-  
3 asset real estate case, the debtor was obliged to file, I  
4 suppose, a response to the motion for relief from stay or under  
5 362(d)(3), wisely filed a plan and disclosure statement within  
6 90 days. I don't think that there's any argument that the other  
7 prong of that test, which is making payments, applies here. So  
8 what we're really dealing with is whether the debtor has a plan  
9 that can be confirmed, has a reasonable possibility of being  
10 confirmed in a reasonable amount of time.

11           Is that right?

12           MR. CALHOUN: Well, yes, Your Honor, except that we  
13 basically have gone way past that and I believe we have a global  
14 settlement.

15           THE COURT: Okay.

16           MR. COSTELLO: With I think pieces broken – pieces  
17 trying to break out in the last several days, which –

18           THE COURT: Okay. This would be a good time to inject  
19 piece because I'm about to –

20           (Laughter.)

21           THE COURT: – I'm about to tell you what I think of  
22 this whole thing. In fact, –

23           MR. COSTELLO: And, well, then perhaps –

24           THE COURT: You can't see it, but I could read this to  
25 you right now. So what would like to tell me about resolving

1 the matter?

2 MR. CALHOUN: Basically, -

3 MR. COSTELLO: Well, Your Honor, - yeah, I think Mr.  
4 Calhoun will present it, but there are arrangements with both  
5 Bank of America and Bank of -

6 THE COURT: Bank of Marin too?

7 MR. COSTELLO: Yes.

8 THE COURT: Okay. Okay. All right.

9 MR. CALHOUN: And - and with Mr. Duke and Flipper  
10 Marine, the judgments that they have there, which is the cross-  
11 collateralized Bank of America loan that we have on the  
12 debtor's -

13 THE COURT: That's the deed of trust that Bank of  
14 America has.

15 MR. CALHOUN: Correct.

16 THE COURT: All right.

17 MR. CALHOUN: So as of, I believe, yesterday or the  
18 day before, we did receive written confirmation that BofA, Mr.  
19 Duke, Flipper Marine, and the debtor would have come to a  
20 settlement on the Bank of America obligation. For the payment  
21 of \$700,000, they will release their deed of trust. I will let  
22 Mr. Costello speak further, if he wants to, or if the Court  
23 wants to hear more about the global aspects of the settlement,  
24 but basically that \$6 million judgment is going to be taken care  
25 of with this \$700,000 payment. What it does to this case is it

1 eliminates the deed of trust against the property so that we  
2 will be clean of that debt and the adversary proceeding that's  
3 pending there.

4 In addition to that, the debtor has arranged pursuant  
5 to its draft of a new disclosure statement, whereby we indicated  
6 we were going to pay everybody 100 cents on the dollar, we are –  
7 have rec- – and immediately we have received commitments in  
8 writing that, subject to the Bank of America settlement, that we  
9 have raised the money necessary to fully reinstate the Bank of  
10 Marin loan, pay all arrearages and taxes, and everybody will be  
11 paid 100 cents on the dollar.

12 THE COURT: Are you proposing to pay them in full,  
13 like pay them off?

14 MR. CALHOUN: Yes – no.

15 MR. COSTELLO: No. Reinstate.

16 MR. CALHOUN: Reinstate.

17 THE COURT: Reinstate, okay. And – all right. And  
18 then are you paying the amount that they're claiming or are you  
19 reserving the right to object?

20 MR. CALHOUN: Only reserving the right to object in  
21 state court as to the receiver's numbers and fees. We have seen  
22 them. We don't think we have any problems with them. Neither  
23 Mr. Duke nor the debtor feels they have any problems with them  
24 or that there will be any contest with those numbers. But we –  
25 those numbers – the ability to contest that in state court is

1 being reserved.

2 THE COURT: Okay. And that seems consistent with what  
3 you had filed before. And then the resolution of this case?

4 MR. CALHOUN: Whatever the Court's desire. We talked  
5 with Mr. — the trustee this afternoon briefly. He feels that  
6 the matter, once it's paid off, it's going to be very short  
7 order, but once it's paid off, that we just basically dismiss,  
8 which is fine with us. If the Court would rather have us  
9 complete a plan, but there would be nobody to vote left, so I  
10 don't know what's going out happen, would happen in that vein  
11 either. But if the Court wants to keep its finger on it — the  
12 Court would always have its finger on it until their — the Bank  
13 of Marin signs off and they've been paid. But whether for the  
14 sake of costs of administration and so forth, the Court wants to  
15 continue it, they can, or we can just dismiss it.

16 THE COURT: And the Bank of Ame- — sorry. The Bank of  
17 Marin note will remain on the property, the promissory note, and  
18 the deed of trust will remain on the property, it will just be  
19 paid consistent with the terms of the existing arrangement?

20 MR. RUBENSTEIN: Yeah. I think we have an agreement  
21 in substance, but I don't think it's procedurally the way it's  
22 set forth.

23 THE COURT: Okay.

24 MR. RUBENSTEIN: And I don't think we have an  
25 agreement, because actually I did a written term sheet which I

1 think they're agreed with. Maybe I can just kind of tell the  
2 Court what we understand it to be. And, again, I don't think  
3 there's substantively different disagreement, -

4 THE COURT: Okay.

5 MR. RUBENSTEIN: - but I -

6 MR. COSTELLO: Well, yeah, that's subject to Mr.  
7 Calhoun. I wouldn't have any objection if you have another copy  
8 of this term sheet, presenting it to the Judge so the Judge  
9 has -

10 MR. RUBENSTEIN: Actually that was -

11 MR. CALHOUN: I'll bring up mine.

12 MR. RUBENSTEIN: Okay.

13 MR. CALHOUN: So that's fine.

14 THE COURT: We can actually make a copy.

15 Tanya, could you just make -

16 THE CLERK: Sure.

17 MR. [SPEAKER]: Your Honor, could I get a copy too,  
18 please?

19 THE COURT: Yeah.

20 Just - I guess make two. Thank you.

21 Okay. So we'll have the term sheet and we'll look at  
22 that.

23 Mr. Rubenstein, you started to talk about you think  
24 you have the terms of a deal but not the procedure of a deal?

25 MR. RUBENSTEIN: No. The - the procedure's in the

1 term sheet.

2 THE COURT: Okay.

3 MR. RUBENSTEIN: I'm saying I think the procedure's a  
4 little different than what Mr. Calhoun just said.

5 THE COURT: Okay. Why don't you tell me what you  
6 think is going to happen from this point forward.

7 MR. RUBENSTEIN: Okay. This - I'm reading from the  
8 term sheet that you're going to get in a second -

9 THE COURT: Okay. That's fine.

10 MR. RUBENSTEIN: Okay.

11 THE COURT: That's probably fine. Go ahead.

12 MR. RUBENSTEIN: Okay. Point one, Bank of Marin is  
13 granted relief from the automatic stay as requested in the  
14 motion, that the order granting it will be granted today at this  
15 hearing.

16 THE COURT: Okay. Go ahead. That's fine.

17 MR. RUBENSTEIN: And that is to exercise any and all  
18 of its rights and remedies under its loan documents and  
19 applicable law in connection with the real property and  
20 improvements, commonly known as 40851 to 40967 Albrae Street,  
21 Fremont, California, and all leases, grants, revenues, income,  
22 issues, and profits derived from the property. While the Court  
23 is entering the order and granting the motion today, relief is  
24 effective January 31st, 2013.

25 THE COURT: Okay.



1 MR. RUBENSTEIN: The 14-day stay of the order  
2 otherwise provided in Bankruptcy Code Rule 4001(a)(3) is waived.

3 In connection with the Bank of America settlement, and  
4 we'll talk about this a little bit later, is they're going to be  
5 asking the Court for an order shortening time to get Court  
6 approval of the BofA settlement. And if the Court will not  
7 grant a hearing date to consider approval of debtor's settlement  
8 agreement with Bank of America on or before January 18th, 2013,  
9 the effective date of relief from the automatic stay will be  
10 February 15th, 2013, rather than January 31st.

11 MR. COSTELLO: Maybe we can just slightly depart from  
12 the term sheet and explain that a little bit right now, Your  
13 Honor. And the BofA settlement is a payment in full for  
14 \$700,000. Now that is not coming from estate funds. It's not  
15 estate funds. However, Bank of Marin – Bank of America believes  
16 it would be appropriate for the debtor to sign the settlement  
17 agreement. And I suspect we have the terms – you know,  
18 agreement in principle, but we haven't seen the agreement – I  
19 suspect there may even be a release in there, which would  
20 require Bankruptcy Court approval.

21 THE COURT: Okay.

22 MR. COSTELLO: But – and we're looking – we're on a  
23 tight – on a short leash with Bank of Marin to get this whole  
24 thing done by the 31st. That's why we're targeting the 18th,  
25 because BofA has to be in place before we can do the

1 reinstatement.

2 THE COURT: Okay.

3 MR. COSTELLO: And so we're looking for shortened time  
4 on that. I think certainly Mr. Duke's position is, is that it's  
5 appropriate – it would be appropriate to grant the order  
6 shortening time given that the settlement is essentially using –  
7 involves the payoff of Bank of America from nonestate funds.

8 The only reason to have Bankruptcy Court approval is because the  
9 debtor is, in fact, signing off on the settlement agreement.

10 THE COURT: Well, and the debtor listed the claim,  
11 that it had a claim against Bank of America that was very  
12 substantial. If I recall, Exhibit B has like a \$5 million claim  
13 against Bank of America, right?

14 MR. CALHOUN: Yes.

15 THE COURT: Okay. I think that under Rule 9013 I can  
16 make – I can shorten time on oral motion if it's made in the  
17 middle of a hearing, and here we are. So I think we can, before  
18 we terminate this hearing, we can pick times and dates for  
19 hearings on an order shortening time. And the parties who are  
20 affected by that motion are present and can stipulate to  
21 whatever we agree to.

22 MR. CALHOUN: And I think –

23 THE COURT: All right. So that I think we can deal  
24 with.

25 Okay. So then point number two, moving onto your

1 settlement agreement. So, Mr. Rubenstein, did you want to  
2 address point number two?

3 MR. RUBENSTEIN: Sure. Okay. During the period  
4 before the termination of the automatic stay, under point one,  
5 the debtor or Daniel Duke or some combination of them, with his  
6 own funds, will have the opportunity to reinstate the Bank of  
7 Marin loan secured by the deeds of trust on the property in  
8 accordance with nonbankruptcy law.

9 THE COURT: Okay.

10 MR. RUBENSTEIN: As you may recall, there are two  
11 notes and two deeds of trust.

12 THE COURT: Right.

13 MR. RUBENSTEIN: Okay. The third item is simply put  
14 in at the request of the debtor because they're concerned they  
15 might be blindsided with something. It doesn't really add  
16 anything substantive, but it's just kind of a comfort provision  
17 that they asked me to read on the record, which I'm doing.

18 Based on information currently available to Bank of  
19 Marin, there are no existing nonmonetary defaults on which it  
20 would rely in seeking to foreclose on its deeds of trust on the  
21 real property. It's conceivable that there exists some  
22 nonmonetary default, of which Bank of Marin is not currently  
23 aware that would justify Bank of Marin taking some enforcement  
24 action. Bank of Marin is not waiving its right to take such  
25 action.

1 THE COURT: Okay.

2 MR. RUBENSTEIN: Okay. And four is the provision  
3 about the settlement between the debtor and Daniel Duke relating  
4 to Bank of America, which has already been discussed with you.

5 THE COURT: And all you're really doing is reciting  
6 that there is expected to be a settlement, \$700,000, for release  
7 of the lien filed against the debtor's property?

8 MR. COSTELLO: Just to clarify, Your Honor, that is  
9 it's more than just a release, it's a payoff of BofA in total.

10 THE COURT: Okay.

11 MR. RUBENSTEIN: And also they asked us to state,  
12 which is – we had no problem with, that Bank of Marin has no  
13 objection to such a settlement between the debtor and Bank of  
14 America, and has no objection to the Court issuing an order  
15 shortening time to consider that.

16 THE COURT: Okay.

17 MR. RUBENSTEIN: This is obviously based on the  
18 understanding that the \$700,000 is coming from funds other than  
19 funds of the estate.

20 THE COURT: Okay.

21 MR. RUBENSTEIN: Item five, the Bankruptcy Court has  
22 previously issued an order excusing the receiver from compliance  
23 with Bankruptcy Code sections 543(a) and 543(b)(1), which was  
24 subsequently amended by an order entered on December 28th. The  
25 order as amended states that it will remain effective through

1 and including January 31st, 2013, except that any party-in-  
2 interest may request a further extension of the deadline.

3 As you will recall, that was the order about the -  
4 excusing the receiver from having to turn over the property in  
5 her possession. The parties have agreed that the existing  
6 January 31, 2013 deadline in that order would be extended to  
7 February 28th, 2013, with the other provisions of the Bankruptcy  
8 Court order to remain unchanged.

9 THE COURT: Okay.

10 MR. RUBENSTEIN: And obviously the Court would have to  
11 do that, but that's what the parties would be requesting.

12 THE COURT: Okay.

13 MR. RUBENSTEIN: And this settlement is conditioned on  
14 the Court actually issuing such an order.

15 Item six, if the Bank of Marin loans are reinstated in  
16 accordance with nonbankruptcy law, Bank of Marin agrees that it  
17 would promptly thereafter inform the receiver that the debtor  
18 has cured the defaults under the existing loan documents, and  
19 requests the receiver to act in accordance with paragraph 32 of  
20 the receivership order entered in the state court action. That  
21 provision provides that for the receiver to immediately turn  
22 over possession of the real property to the debtor upon the  
23 occurrence of various events, one of which is being notified by  
24 Bank of Marin that the loan has been cured. It does not provide  
25 for the receiver to turn over possession of the funds. That's -

1 that's handled by another provision of the receivership order.  
2 But as far as – this is talking about turning over the real  
3 property to the debtor upon the loan being reinstated.

4 THE COURT: So the debtor becomes – starts running the  
5 property again?

6 MR. RUBENSTEIN: Yes.

7 MR. COSTELLO: Correct.

8 MR. RUBENSTEIN: Right.

9 THE COURT: All right.

10 MR. RUBENSTEIN: Number seven is if the Bank of Marin  
11 loans are reinstated in accordance with nonbankruptcy law, Bank  
12 of Marin would support a request by the debtor to dismiss the  
13 bankruptcy case.

14 There was one more item, which is not here, that we  
15 have also, I think, have an agreement on.

16 THE COURT: The copy that I have has Mr. Chiang's  
17 interlineations.

18 MR. CHIANG: Then that's the issue that Mr. Rubenstein  
19 was about to bring up –

20 THE COURT: Superior court.

21 MR. RUBENSTEIN: About this –

22 MR. CHIANG: This is first.

23 MR. RUBENSTEIN: Yeah. That's something we talked  
24 about after I wrote this up.

25 THE COURT: Okay.

1 MR. RUBENSTEIN: If the parties will seek state court  
2 approval to authorize release of an agreed-upon portion of the  
3 funds the receiver is holding, which will be paid to Bank of  
4 Marin and applied to the indebtedness owed by the debtor to Bank  
5 of Marin. The receiver is holding, I believe, approximately  
6 \$200,000. Some portion of that, she needs to – you know, there  
7 will be additional expenses and things of that nature, but she  
8 doesn't need to be holding \$200,000.

9 So the idea is that we will ask the superior court to  
10 release some agreed-upon portion. Obviously the receiver has to  
11 buy off on what the agreed-upon portion is to be paid to Bank of  
12 Marin, which would have the effect of reducing the additional  
13 payment that has to be made – paid to Bank of Marin to reinstate  
14 the loan.

15 THE COURT: So you're going to take some of the money  
16 that the receiver has and apply it to that arrearage, basically  
17 to the arrearage claim?

18 MR. RUBENSTEIN: Yes.

19 THE COURT: Yes.

20 MR. RUBENSTEIN: Yes, to the amount that is – yeah,  
21 the arrearages, the amount that's –

22 MR. COSTELLO: May not be necessary to reinstate –

23 MR. RUBENSTEIN: – passed through.

24 THE COURT: Okay.

25 MR. RUBENSTEIN: Yeah.

1           THE COURT: All right. So you're just getting –  
2 somehow you're going – and is the debtor or Mr. Duke's counsel  
3 going to be involved in coming up with that number?

4           MR. RUBENSTEIN: Well, what we're going to do – as I  
5 understand is they want the number to be as high as possible.  
6 And so what really is going to turn out is we're going to talk  
7 to the receiver about how much of a cushion she figures she  
8 needs.

9           THE COURT: Okay.

10          MR. RUBENSTEIN: And also there is likely that certain  
11 amount are – of Bank of Marin's attorney's fees that will be  
12 incurred in winding up the receivership case will be paid out of  
13 that. So we've bandied about some numbers, but I don't have  
14 something from the receiver –

15          THE COURT: Okay. And is that – the resolution of  
16 that is going to take place in the superior court, though?

17          MR. RUBENSTEIN: Right.

18          THE COURT: That number, whatever –

19          MR. RUBENSTEIN: Right.

20          THE COURT: – number or dispute that – Mr. Calhoun,  
21 you said earlier you may have issues with respect to payment of  
22 the receiver for costs the receiver incurred –

23          MR. CALHOUN: I don't expect to have them, but that  
24 was being reserved. And, just for the Court's information, the  
25 trustee's fees have been paid –



1 MR. RUBENSTEIN: Receiver.

2 MR. CALHOUN: - receiver's - fees have been paid to  
3 the receiver as they've gone along, -

4 THE COURT: Okay.

5 MR. CALHOUN: - collected the money. So that portion  
6 has been already paid. So when we're talking about \$200,000,  
7 that is trus- - receiver has been paid.

8 THE COURT: All right.

9 MR. RUBENSTEIN: Well, but -

10 MR. CALHOUN: There will be some dangling money.

11 MR. RUBENSTEIN: Obviously the state court has to  
12 approve the payment but, you know, she's - she's taken in her  
13 own payments, just like in a bankruptcy case, subject to court  
14 approval.

15 Now one of the - one of the things that will matter in  
16 her deciding how much the cushion is going to be is whether  
17 there is the potential of the debtor making a claim against her  
18 in the receivership case because in which case she would  
19 undoubtedly need to file - retain a lawyer. So although we are  
20 not making it a condition of the settlement that they say  
21 they're not going to make a claim against the receiver, they  
22 have already made a claim against the receiver. I mean they've  
23 sent some letters saying that they're going to be asserting a  
24 claim. And then my expectation is as long as that possibility  
25 exists, the receiver is going to want to hold sufficient funds

1 from the receivership estate to be able to deal with it and  
2 defend against it.

3 THE COURT: Okay.

4 MR. RUBENSTEIN: And so I mean — so that's one of the  
5 reasons we don't know what the number's going to be. Part of  
6 it —

7 THE COURT: Well, then some of it's in the debtor's  
8 and Mr. Duke's control.

9 MR. RUBENSTEIN: Exactly.

10 THE COURT: Okay.

11 MR. COSTELLO: And it's within — presumably that all  
12 gets resolved, there will be — presumably by next week there  
13 will be a stipulated motion or order in front of the state court  
14 to allow the receiver to release funds —

15 THE COURT: Okay.

16 MR. RUBENSTEIN: Yeah.

17 MR. COSTELLO: — and that presumably — that's where  
18 the issue of the claims against the receiver could be dealt with  
19 and resolved as well.

20 THE COURT: Right. That makes sense to me. Okay. So  
21 in terms of what we need to accomplish here today, the first  
22 thing it seems to me that we need to do is we need an order  
23 shortening — I need to grant an order shortening time and find a  
24 time to get the settlement between the debtor — I guess it's  
25 between the debtor and Mr. Duke and Bank of America on the

1 calendar, so – so that we can see if there are objections and  
2 whether that can be approved or not.

3 And we'd like to have that heard before – on or before  
4 January 18th; is that right?

5 MR. CALHOUN: That is what has been worked out between  
6 – pretty much between Mr. Duke with Mr. Costello's office and –  
7 and Bank of Marin. I'm – I'm not trying to make the Court jump  
8 over any barrels or anything like –

9 THE COURT: I just have to see if I have time to do it  
10 and –

11 MR. CALHOUN: I know. So I mean it's not important to  
12 me as whether it's the 18th or the 31st or the 10th.

13 MR. COSTELLO: But it is important in terms of what –  
14 when the relief from stay is effective. That's –

15 MR. CALHOUN: Correct.

16 MR. COSTELLO: We have a –

17 MR. RUBENSTEIN: Well, the – the terms of the  
18 agreement are is they're asking the Court to have it heard on or  
19 before the 18th. And the only reason it won't be heard before  
20 or on the 18th is if it's not convenient to the Court.

21 THE COURT: Why don't we do it three o'clock on  
22 Wednesday, on the 17th.

23 THE CLERK: Okay.

24 THE COURT: So three o'clock on the 17th, which is a  
25 Thursday. Is that convenient for counsel? And you can appear

1 by telephone. You don't need to appear in court. Then the  
2 issue becomes -

3 MR. GUERIN: This is Regis Guerin for Bank of America.  
4 That's fine with us.

5 THE COURT: The issue becomes an order?

6 MR. COSTELLO: The issue - no. The issue becomes when  
7 the motion has to be served.

8 THE COURT: Right, and a response made.

9 Is it your motion or is it your motion, Mr. Calhoun's  
10 motion -

11 MR. COSTELLO: It's Mr. Calhoun's motion. It's the  
12 debtor's motion.

13 THE COURT: Okay. So, Mr. Calhoun, how much time do  
14 you need to make that motion?

15 MR. CALHOUN: Tuesday.

16 THE COURT: Tuesday of next week?

17 (No audible response.)

18 THE COURT: Okay. Filed and served by Tuesday of next  
19 week, which, for the record, is the 8th.

20 Any objection to the proposed resolution can be made  
21 at the time of the hearing on the 17th? Otherwise I think the  
22 time is much too short. So anyone can object for any reason at  
23 the hearing telephonically or in person.

24 And so - but the notice that you will give, Mr.  
25 Calhoun, will simply say there's a hearing on that date, the

1 Court's shortened time, any objection should be raised at the  
2 hearing.

3 MR. CALHOUN: Fine.

4 THE COURT: And then it's the 17th at 3:00. All  
5 right. So that's point one.

6 Point two is this is really a resolution of the – the  
7 relief-from-stay motion that your client made, counsel. So I  
8 think under – I don't think we need separate notice of this  
9 whole business because I think under 4001(d)(4), we'll call it –  
10 we don't have to get – we don't have to have separately noticed  
11 out of hearing because this – the relief that you're seeking is  
12 less, in your stipulation is less than you might have been  
13 entitled to if you pressed the motion. So I say you just have  
14 to upload a stipulation that the parties have agreed to. And if  
15 it's consistent with what you've told me here today, I'll sign  
16 an order approving it.

17 MR. RUBENSTEIN: Okay. Just – well, what I believe  
18 the order in the agreement is, is the Court is just granting the  
19 motion for relief from the automatic stay effective January  
20 31st.

21 THE COURT: Okay.

22 MR. RUBENSTEIN: And with a 14-day waiver of Rule  
23 4001.

24 THE COURT: That's your point one.

25 MR. RUBENSTEIN: Yeah. Yeah. I mean I don't – I

1 don't think all this other stuff is from the relief-from-stay  
2 order.

3 THE COURT: Okay.

4 MR. COSTELLO: Agreed. I think it just – it should be  
5 an approved form of order, but I think it's a very simple order  
6 that just grants relief from stay effective as of the 31st.

7 MR. CHIANG: That's right, Your Honor. I can just  
8 upload or circulate an order granting – the proposed order  
9 granting stay relief with –

10 THE COURT: Okay. That's –

11 MR. CHIANG: – the effective dates.

12 MR. RUBENSTEIN: Okay.

13 THE COURT: I think the fastest thing would be if you  
14 just have counsel sign off, otherwise we hold them. But if you  
15 have Mr. Calhoun and Mr. Costello sign off, then we'll move  
16 forward with it –

17 MR. RUBENSTEIN: If we can – well, obviously we'll  
18 submit it to – generally, you'll be able to get to it promptly.

19 MR. [SPEAKER]: Yes, agreed.

20 MR. RUBENSTEIN: Okay.

21 THE COURT: All right. So that takes care of the  
22 motion for relief from stay and the order shortening time. Then  
23 what remains I think is Mr. Wesolowski's motion to convert.

24 MR. RUBENSTEIN: There's another motion –

25 THE COURT: Okay.

1           MR. RUBENSTEIN: - as well. The Court had issued the  
2 order confirming - excuse me - the order excusing the receiver  
3 from compliance with Bankruptcy Code Section 543(a) and 543(b),  
4 which currently has by its terms ends on January 31st, 2013,  
5 unless further extended. Then that order should be - it's  
6 previously been amended once to go over - yeah, I think last  
7 week the Court signed that order -

8           THE COURT: Yeah.

9           MR. RUBENSTEIN: - going to January 31st, 2013. It  
10 should be amended a second time to go to February 28th, 2013,  
11 with everything else in the order remaining the same.

12          THE COURT: Any objection to that, gentlemen?

13          MR. COSTELLO: Mr. Duke - the rationale, Your Honor,  
14 is, is that if for some reason Mr. Duke and the debtor failed to  
15 perform, Bank of Marin doesn't want to be in a situation where  
16 come January 31st all of sudden the receiver is out of  
17 possession and the debtor is back in possession. So consistent  
18 with - with the terms of our arrangement, Mr. Duke has no  
19 objection to that.

20          THE COURT: Okay. And, Mr. Calhoun, you've previously  
21 not liked the idea of the receiver. Do you agree to a receiver  
22 at this point -

23          MR. CALHOUN: Well, I'm just a penny-pincher in the  
24 sense that I don't like the fees that accrue. I'd like some  
25 recognition that we may not be charged for fees for February if

1 it's a one-day or a two-day deal.

2 THE COURT: Well, I imagine the receiver is going to  
3 act in every way fairly. And so we'll - if necessary, I'll deal  
4 with that, but I think it's actually something that the superior  
5 court has to deal with, -

6 MR. CALHOUN: Yeah.

7 THE COURT: - the receiver being their creature, not  
8 mine.

9 MR. CHIANG: Then, Your Honor, would you like me to  
10 circulate another - a second order extending that date?

11 THE COURT: I think that makes sense because it keeps  
12 the - it keeps the case in the same status while the matter is  
13 resolved. And I think earlier I concluded it made sense to  
14 leave the receiver in place, which was a little unusual, but I  
15 think under the facts still the right thing to do. We'll just  
16 continue the receiver in place and that will be the order.

17 MR. WESOLOWSKI: And, Your Honor, the U.S. Trustee  
18 originally had an objection to the receiver, but under the  
19 circumstances I think what you're doing here is appropriate.

20 THE COURT: Okay. All right. Well, thank you.

21 All right. So, Mr. Chiang, I guess two orders. One  
22 is the on the relief from stay and the second on the receiver.  
23 And I think it would be helpful if you had opposing counsel sign  
24 off on both orders, so I know that the terms are consistent with  
25 what they think is happening.



1 MR. CHIANG: I'll do that, Your Honor.

2 THE COURT: Okay. And then, counsel, if you could,  
3 you know, be responsive to Mr. Chiang's - I'm sure he'll fax  
4 them to you or email them to you, get them back to him  
5 immediately so we can get this thing resolved.

6 All right. Is there anything else that we need to  
7 discuss?

8 MR. WESOLOWSKI: Your Honor, we got the motion to  
9 convert or dismiss. Maybe that should just be continued to some  
10 future date.

11 THE COURT: Yeah, I think that makes the most sense.  
12 Why don't we continue that.

13 Do we have a March - is it March 7th, Tanya?

14 THE CLERK: Yes.

15 THE COURT: Let's continue that to March - although,  
16 actually, we should put that on a law and motion calendar at  
17 that point because we won't need a status conference.

18 THE CLERK: Okay.

19 THE COURT: Although we do need to figure out where  
20 this case is going.

21 (The Court and Clerk confer.)

22 MR. WESOLOWSKI: Your Honor, there's also a status  
23 conference today as well.

24 THE COURT: So we'll continue the status conference  
25 and the motion the convert or dismiss to March 7 at - is it at -

1 THE CLERK: 10:00 or 1:00 – 2:00.

2 THE COURT: 10:00, I think. 10:00 a.m.

3 MR. WESOLOWSKI: And that would be the disclosure  
4 statement hearing as well, which is sort of mute at this point,  
5 it looks like.

6 THE COURT: Right, right. It would be continued as  
7 well, I suppose.

8 So, Mr. Calhoun, just to be clear, we're not expecting  
9 you to go forward with a disclosure statement given the  
10 settlement that you've announced, so – and if something goes  
11 wrong and you are pressing that, you'll need to give the  
12 Courtroom Deputy a call.

13 MR. CALHOUN: Okay.

14 THE COURT: A calendar we don't use for disclosure  
15 statements.

16 MR. RUBENSTEIN: One clarification. On the – on the  
17 order granting relief from the automatic stay, I mean we're  
18 supposed to put in the order the Bankruptcy Code section that  
19 it's based on and our motion was based on 362(d)(1) and 362- –

20 THE COURT: (3).

21 MR. RUBENSTEIN: – 362(d)(1) and 362(d)(3). That –  
22 so –

23 THE COURT: I actually think it's a stipulated order,  
24 so I think you just – it's a stipulated order, so I think what  
25 it is is what the parties have agreed to, not what I would have

1 concluded. I would have told you what I was going to conclude,  
2 but you didn't want to hear that.

3 MR. RUBENSTEIN: Okay. Well, -

4 THE COURT: And I don't think you want to hear it  
5 now..

6 (Laughter.)

7 THE COURT: So I think you better just say the parties  
8 have stipulated to this relief. It's a very good resolution, I  
9 think.

10 MR. RUBENSTEIN: Okay.

11 THE COURT: I will say that. And so I think you just  
12 say the motion is granted -

13 MR. RUBENSTEIN: Pursuant to. Perfect.

14 MR. CHIANG: Have to say the motion is granted, Your  
15 Honor, under 362 -

16 THE COURT: Yeah.

17 MR. CHIANG: - (3).

18 THE COURT: 362(d).

19 MR. RUBENSTEIN: Good enough, okay.

20 THE COURT: Right. Anything else? So we got the  
21 trustee's motion -

22 MR. GUERIN: Your Honor, Regis Guerin for Bank of  
23 America.

24 THE COURT: Yes.

25 MR. GUERIN: There is also a motion to dismiss the

1 adversary complaint scheduled for January 14th.

2 THE COURT: Okay.

3 MR. GUERIN: I would suggest that we just move that  
4 out to the March date.

5 THE COURT: So the parties to that, are they presented  
6 here today? That's - that's you, Mr. Calhoun, it's your - it's  
7 your adversary proceeding, right?

8 MR. CALHOUN: Yes.

9 THE COURT: And, Mr. Guerin, are you representing the  
10 Bank of America in that matter?

11 MR. GUERIN: Yes, Your Honor.

12 THE COURT: All right. And so do the parties agree to  
13 move the initial hearing on the status conference?

14 MR. CALHOUN: Yes.

15 THE COURT: Okay.

16 MR. CALHOUN: Shall we move it to the 17th?

17 THE COURT: I don't think they'd come up twice a  
18 month.

19 Do you know when the next date is on that, Tanya?

20 THE CLERK: Well, that - the motion on the 14th is on  
21 the adversary motion calendar.

22 THE COURT: Right.

23 THE CLERK: Okay.

24 THE COURT: So let's just move it to the next  
25 adversary motion calendar and see where it can go.

1 THE CLERK: To the one after the 14th?

2 THE COURT: Yeah, —

3 THE CLERK: February 4th.

4 THE COURT: No, a month. So to — whenever the next  
5 one is.

6 THE CLERK: February 19th.

7 THE COURT: Okay. So February 19th, Mr. Guerin.

8 February 19th for your motion to dismiss, which —

9 MR. GUERIN: Okay.

10 THE COURT: — you know if the parties have resolved  
11 this matter — Mr. Calhoun, have you answered that complaint, —  
12 Mr. Guerin, no you filed a motion to dismiss.

13 MR. CALHOUN: Correct.

14 MR. GUERIN: Correct.

15 THE COURT: All right. You can stipulate to dismiss,  
16 if that makes sense. Otherwise you can appear and we'll deal  
17 with it at the time.

18 MR. CALHOUN: And there is —

19 MR. GUERIN: Right.

20 MR. CALHOUN: — one other little thing that was — it's  
21 somewhat important, I guess, is a BofA was going to represent  
22 that they are in agreement with the settlement as recited today.

23 THE COURT: Is that true, Mr. Guerin?

24 MR. GUERIN: Is that — that is correct, Your Honor.

25 THE COURT: Okay. Well, through have it, Mr. Calhoun.

1 MR. RUBENSTEIN: Your Honor, just out of an abundance  
2 of caution, if anything can go wrong, it will, I can envision –  
3 I can envision the superior court order, you know if we go in  
4 and we ask the money to be released, it will say, 'Oh, gee whiz,  
5 this case is in bankruptcy,' so can we have a provision, and I  
6 think obviously it would be subject to everybody's buyoff, in  
7 the relief from stay order, basically, saying that relief from  
8 stay includes the right to have the superior court order –  
9 superior court release funds held by the receiver.

10 MR. CALHOUN: To your client?

11 MR. RUBENSTEIN: Yes.

12 MR. CALHOUN: I have no problem. I would – I would  
13 rather get that money into Bank of Marin's hands as opposed to  
14 being \$20 short come the 31st of January.

15 THE COURT: Okay. That in effect is just a payment on  
16 the secured debt, which wouldn't require a plan anyway. So I  
17 don't have a problem including that in the order at all.

18 MR. RUBENSTEIN: Okay. Thanks.

19 One other comment, and this is – I apologize, it's  
20 kind of difficult to – it's more of a question of Mr. Guerin.  
21 And I'm sorry pressing this in court, is I expect – because Bank  
22 of America is a party to the superior court action, I envision  
23 that what we're going to do is we're going to make an  
24 application to the superior court and be accompanied, ideally,  
25 by a stipulation to all parties to that case saying that they

1 agree or they have no objection to what the request is, in an  
2 effort to try to avoid having the superior court put it on a  
3 28-day calendar, or something like that. Would Bank of America,  
4 obviously subject to the – looking at the stipulation, make sure  
5 it's acceptable, is that something that Bank of America would be  
6 willing to do?

7 MR. GUERIN: Yeah. I don't think we have any – any  
8 dogs in that fight, so to speak. I don't think we have any  
9 problems with it, so.

10 MR. RUBENSTEIN: Thank you.

11 THE COURT: Okay.

12 MR. GUERIN: You can send me the stipulation and we'll  
13 take a look and most likely sign off on it.

14 MR. RUBENSTEIN: Thank you.

15 THE COURT: Okay. I think that's it. I think it's a  
16 very good resolution for the parties. I'm sure it was a lot of  
17 work getting here. And so I'll see whoever's here on the 17th  
18 for the hearing on the motion to approve the resolution with  
19 Bank of America. And, otherwise, I'll receive two orders from  
20 Mr. Chiang, which will be the relief-from-stay order and the  
21 receiver order.

22 Is that it?

23 MR. RUBENSTEIN: Yes. Thank you very much, Your  
24 Honor.

25 THE COURT: Okay. And continued hearings on the

1 adversary proceeding and Mr. Wesolowski's motion.

2 MR. COSTELLO: Your Honor, I just didn't have in my  
3 notes. The adversary proceeding hearing was scheduled to – to  
4 February 19th –

5 THE COURT: It was on the 14th originally and it's  
6 moved to February – February 19th?

7 THE CLERK: Yes.

8 THE COURT: February 19th at –

9 MR. COSTELLO: What – what time?

10 THE CLERK: At 1:30.

11 MR. COSTELLO: At 1:30. Thank you.

12 THE CLERK: And the CMC?

13 THE COURT: The CMC goes with – I think – did we say  
14 March 7th? The CMC and the disclosure statement and Mr.  
15 Wesolowski's motion are all going to the next status conference  
16 date.

17 MR. WESOLOWSKI: We did say that, yes.

18 THE CLERK: The CMC and the adversary or are you  
19 talking about the status conference?

20 THE COURT: When is the CMC –

21 THE CLERK: The CMC is for the end of this month, the  
22 31st.

23 THE COURT: Do you want to just move that to the 19th  
24 as well?

25 THE CLERK: Yes.



1 THE COURT: Okay. Mr. Guerin, just to be clear,  
2 there's a CMC in the adversary proceeding at the end of this  
3 month which we're also going to move to the 19th of February.  
4 So you're going to have your motion to dismiss and the case  
5 management conference on the same day.

6 MR. GUERIN: Fantastic.

7 THE COURT: And so –

8 MR. GUERIN: I do anticipate that it will be dismissed  
9 by then, anyway, but –

10 THE COURT: We'll – we'll –

11 MR. GUERIN: Thank you.

12 THE COURT: – eliminate the need to file a case  
13 management conference statement too.

14 MR. CALHOUN: Yes. And in the event we can get this  
15 done in writing and stipulated, then we can relieve the Court of  
16 that date too. So I'll get that to as soon as we can.

17 THE COURT: Okay.

18 MR. GUERIN: Thank you, Your Honor.

19 THE COURT: Thank you very much.

20 MR. RUBENSTEIN: Thank you.

21 THE COURT: All right. Good luck.

22 MR. CALHOUN: Thank you, Your Honor.

23 THE CLERK: That concludes the calendar. Please rise.

24 (The hearing was concluded at 3:41 o'clock p.m.)

25 –o0o–

State of California                    )  
  )     SS.  
County of San Joaquin                )

I, Susan Palmer, certify that the foregoing is a true and correct transcript, to the best of my ability, of the above pages, of the digital recording provided to me by the United States Bankruptcy Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above matter.

I further certify I am not a party to nor in any way interested in the outcome of this matter.

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Dated March 5, 2013